Supreme Court, U. S.
FILED
JAN 21 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-444

NORTHEAST MARINE TERMINAL COMPANY, INC. AND STATE INSURANCE FUND,
Petitioners,

v.

RALPH CAPUTO

AND

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR
Respondents.

No. 76-454

INTERNATIONAL TERMINAL OPERATING CO., INC.
Petitioner,

v.

CARMELO BLUNDO

AND

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF OF AMICUS CURIAE, NATIONAL ASSOCIATION OF STEVEDORES

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BRIEF OF AMICUS CURIAE, NATIONAL ASSOCIATION OF STEVEDORES

STATEMENT OF INTEREST OF AMICUS CURIAE

This *amicus curiae* brief is filed on behalf of the National Association of Stevedores (hereinafter "NAS") with the written consent of all parties to these cases. The NAS is a nonprofit corporation incorporated on January 30, 1975 pursuant to the District of Columbia Nonprofit Corporation Act, 29 D.C. Code 1001 *et seq.*, for the purpose of promoting, furthering and supporting the stevedoring and marine terminal industry in the United States, its territories and possessions. It is the corporate successor to the unincorporated association of the same name organized in the District of Columbia in 1933. It has been given tax exemption rulings by both the Government of the District of Columbia and the Internal Revenue Service. Sec. 1005(b) of Title 29 of the District of Columbia Code specifically provides that a nonprofit corporation shall have the power to sue and be sued, complain and defend, in its corporate name.

The present membership of the NAS comprises 60 private marine terminal and stevedore employers doing business in ports on the nation's four seacoasts and the state of Hawaii. Based upon U.S. government manhour statistics for calendar year 1974 it is conservatively estimated that NAS member companies are responsible for over 70 percent of the industry's total manhours in all U.S. ports.

The member companies of the NAS employ the majority of U.S. dock and privately employed marine terminal labor, some of whom may be entitled to federal Longshoremen's and Harbor Workers' Compensation Act,[1] (hereinafter the "LHWCA") and some of whom may be subject to state workers' compensation laws. The NAS member companies are directly responsible for workers' compensation payments under both federal and state

[1] 33 USC § 901 *et seq.*

law either as self-insureds or through insurance carriers licensed by the U.S. Department of Labor or state insurance commissions.

Thus, the interests of the NAS and its member companies in the outcome of any litigation concerning the scope of benefits and jurisdiction of the federal LHWCA is second to none, except the injured worker, and far surpasses that of the governmental entities which merely administer the statutes, state or federal.

LHWCA insurance costs, be it premiums paid to licensed carriers, or benefits paid directly to employees, are the second largest cost of a private marine terminal operator or stevedore company, exceeded only by direct payroll expenses. Any decision by this or any other Court or administrative body as to which employee is entitled to federal LHWCA benefits and which is entitled to state compensation benefits has a direct and substantial economic impact upon each and every member of the NAS. For these reasons, the NAS has been authorized and directed by its member companies to appear on their behalf in all appropriate Courts until the industry-wide issue of state and federal jurisdiction in the matter of workers' compensation is finally resolved. Pursuant to that mandate the NAS participated as a party before the Benefits Review Board, U.S. Department of Labor and before the Fourth Circuit Court of Appeals in both the original hearing and *en banc* rehearing in *I.T.O. Corporation of Baltimore et al.* v. *William T. Adkins et al.*, now before this Court *sub nom William T. Adkins* v. *I.T.O. Corporation of Baltimore and Liberty Mutual Insurance Company and National Association of Stevedores*, No. 76-730. In addition, the NAS appeared as *amicus curiae* before the Second Circuit Court of Appeals in the matters which are the subject of this proceeding, and at the request of the Court participated in oral argument as well as submitting a brief *amicus curiae*.

Accordingly, the NAS submits this brief *amicus curiae* to the Court for its consideration in the matters now pending before it.

QUESTION PRESENTED

The issue before this Court may be simply stated as:

Where did the Congress in 1972 draw the line between federal LHWCA benefits and state workers' compensation laws and benefits and, were the injured "employees" performing the functions intended by Congress to be subject to federal LHWCA benefits at a location to which Congress extended the coverage of the LHWCA?

THE FACTS

The facts in each of these consolidated cases are not in dispute.

In No. 76-4444, Ralph Caputo was inside a consignee's truck assisting the truckman in loading cases of cheese into the truck when he tripped and hurt his foot. The cases of cheese had been unloaded from an ocean vessel some five days prior to Mr. Caputo's injury. At the time of his injury Mr. Caputo was employed as "terminal labor" by petitioner, Northeast Marine Terminal Company, Brooklyn, New York [Pet. A. 11a][2]

In No. 76-454, Carmelo Blundo was employed as a cargo checker by petitioner, International Terminal Operating Co. (ITO) and was working with a crew of men who were removing cargo from a container at the 19th Street Pier of ITO, Brooklyn, N.Y. when he slipped on ice and fell. The container with which he was working had been discharged from an ocean vessel by another

[2] References to the appendix to petitions for writs of certiorari are designated herein as "Pet. A. ——."

employer (not a party hereto) at a pier in Staten Island, New York and had been trucked over the city streets to Brooklyn to the ITO facility, which was not used by ITO for the loading or unloading of vessels. [Pet. A. 9a-10a]

SUMMARY OF ARGUMENT

The NAS believes that when Congress amended the LHWCA in 1972 to extend its coverage shoreward from the water's edge, that Congress intended to limit the shoreward intrusion and usurpation of state workmen's compensation laws for a specific group of employees working in a specified area adjoining the navigable waters. The NAS believes that only those employees injured while performing vessel loading and unloading functions traditionally performed by longshoremen at places customarily used by their employers to load or unload vessels were meant to be entitled to federal LHWCA benefits.

It seems abundantly clear that the functional line of demarcation between traditional longshore operations and the line between vessel loading or unloading and inland transshipment is the "point of rest" (place of rest, marshalling yard or storage area)—a line of functional demarcation long known and observed by employee, employer, the courts, federal regulatory agencies, writers, sociologists, and the public. It is at the "point of rest" that vessel unloading terminates in the case of import cargo and where it begins in the case of export cargo. No other place on the terminal or functional line of demarcation between the type of operations, employees or employers exists which more precisely coincides with the expressed intent of the Congress.

Whether called "point of rest," "place of rest" or any other local descriptive name, the "point of rest" and its attendant functional and operational divisions are exactly the same at every port in the United States and are

clearly understood and readily discernible by all parties involved in the movement of waterborne commerce in this country.

The truck loading functions of Ralph Caputo and the shipping van or container stripping function of Carmelo Blundo are neither traditional longshoring functions nor maritime employment within any meaning known to industry anymore than any other strictly land-based handling or watching of cargoes which may have been or are destined to be carried by vessels on navigable waters. The unwarranted extension of admiralty jurisdiction and federal LHWCA coverage shoreward of the "point of rest" into traditional land-based functions performed by land-based employees destroys the uniformity of the compensation system envisaged by the Congress and creates manifest economic and competitive disadvantage to private employers which was neither contemplated nor intended.

For these reasons, the NAS believes that the Benefits Review Board and the Court below both erred in awarding federal LHWCA benefits to Ralph Caputo and Carmelo Blundo, and that those awards must be set aside by this Court in a manner that will terminate future litigation in this troublesome and costly controversy.

ARGUMENT

The 1972 Amendments to the LHWCA—A Jurisdictional Line Was Moved

In 1972, the Congress substantially amended the LHWCA by enacting PL 92-572 which, in addition to the amendments here in controversy, substantially increased benefits payable to eligible injured employees; eliminated third party actions by injured longshoremen against vessels predicated upon seaworthiness; and declared void as against public policy indemnification

agreements between the stevedore and vessel owner. *Landon* v. *Lief Hoegh and Co., Inc. et al.*, 521 F.2d 756 (2nd Cir.—1975).

In addition to the aforementioned amendments Congress also changed the statutory definitions of (a) "employee" [3] and (b) "employer" [4] and extended shoreward from the water's edge the situs of injuries for which federal LHWCA benefits could be paid to an employee meeting the new definition of section 902(3) working for an employer as defined in section 902(4).

Congress extended shoreward the jurisdictional line between federal and state compensation laws only for a certain specified type of employee. The questions are how far shoreward was the line moved, and for which employees. Prior to 1972 that line lay shipside at the water's edge—the so-called *Jensen* line. *Southern Pacific Company* v. *Jensen*, 244 U.S. 205, 37 S. Ct. 527 (1917) and *Nacirema Operating Co.* v. *Johnson*, 396 U.S. 212, 90 S. Ct. 347 (1969).

Thus, in amending the LHWCA Congress provided that in addition to benefits being payable to "employees" for injuries occurring directly upon the navigable waters, compensation shall also be paid to "employees" for injuries occurring shoreside on

> "(* * * * any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing or building a vessel)."

By amending the statute by the above quoted statutory parenthetical insert, Congress moved the jurisdictional compensation line shoreward *only* to areas adjoining the "navigable waters" which are customarily used for *ves-*

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[3] 33 USC § 902(3).

[4] 33 USC § 902(4).

sel loading and unloading, or for *vessel* repairing or building. Congress did not extend the jurisdictional line to areas customarily used for the loading or unloading of motor vehicles or rail cars.

Prior to the 1972 amendments an "employee" was defined as anyone employed by an employer but not a member of the vessel's crew, its master, nor any person engaged by the master to unload or load a vessel under eighteen tons net. Obviously, if the Congress had intended to extend the LHWCA benefits shoreward of the *Jensen* line to each and every "employee" of an "employer" Congress would not have amended the definition of "employee" as it then stood in section 902(3) of the LHWCA. But Congress did modify the definition of "employee" by adding the following limiting language:

> "[means] any person engaged in maritime employment, including any longshoreman, or other person engaged in longshoring operations, and any harbor worker including a ship repairman, shipbuilder, and ship breaker,"

There must be a nexus, some direct relationship, between the work being performed at the time of the injury and traditional maritime activity involving navigation and commerce on navigable waters. *Pennsylvania Railroad Company* v. *O'Rourke*, 344 US 334, 73 S. Ct. 302 (1953), *Nogueira* v. *New York, N.H. & H.R. Co.*, 281 US 128, 50 S. Ct. 303 (1930). Clearly, like the log pond worker in *Gilmore*,[5] truck loading, rail car loading, container stuffing, stripping, or repairing, etc. are not so directly related.

All that Congress did by the 1972 amendments was to extend LHWCA coverage across the water's edge to those

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[5] *Weyerhauser Co.* v. *Gilmore*, 528 F.2d 957 (9th Cir. 1975), cert. den. 45 USLW 3241 (U.S. Oct. 4, 1976).

"employees" who "would *otherwise* be covered by the Act for part of their daily activity" [6] on the navigable waters. It was not intended that LHWCA benefits be extended to terminal and warehouse workers, none of whose daily activity is upon the navigable waters. It is the position of the NAS that the scope of "longshoring operations" which are included in the term "maritime employment" begins and ends with the activity of loading and unloading vessels. Furthermore, it is the position of the NAS that the loading and unloading activity is clearly defined in industry practice and elsewhere as the activity of a longshore gang moving cargo in a continuous operation between the vessel and the "point of rest" on the pier. This position has been adopted by the Fourth Circuit Court of Appeals [7] and concurred in by Judge Lumbard in the cases now before this Court [Pet. A. pg. 42a-44a].

The legislative history of the 1972 amendments pertaining to the extension of LHWCA coverage shoreward is meager. The main enlightenment provided by Congress is found in the Committee Reports referred to by the Court below [Pet. A. 30a-34a]. In those reports, the Committees had this to say:

> "It is apparent that if the Federal benefit structure embodied in Committee bill is enacted, there would be a substantial disparity in benefits payable to a permanently disabled longshoreman, depending on which side of the water's edge the accident occurred, if State laws are permitted to continue to apply to injuries occurring on land. It is also to be

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[6] S. Rept. 92-1125 at pg. 13 and H. Rept. 92-1441 at pg. 10-11. Emphasis added.

[7] *I.T.O. Corporation of Baltimore et al.* v. *Adkins et al.*, 529 F.2d (4th Cir. 1975), en banc decision of Aug. 26, 1976, pet for cert. pending as No. 76-730 *sub nom Adkins* v. *I.T.O. Corporation of Baltimore et al.*

noted that with the advent of modern cargo handling techniques, such as containerization and the use of LASH-type vessels, more of the longshoreman's work is performed on land than heretofore.

The Committee believes that the compensation payable to a longshoreman or a ship repairman or builder should not depend on the fortuitous circumstance of whether the injury occurred on land or over water. Accordingly, the bill would amend the Act to provide coverage of longshoremen, harbor workers, ship repairmen, ship builders, shipbreakers, and other employees engaged in maritime employment (excluding masters and members of the crew of a vessel) if the injury occurred either upon the navigable waters of the United States or any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other area adjoining such navigable waters customarily used by an employer in loading, unloading, repairing, or building a vessel.

The intent of the Committee is to permit a uniform compensation system to apply to employees who would otherwise be covered by this Act for part of their activity. To take a typical example, cargo, whether in break bulk or containerized form, is typically *unloaded from the ship and immediately transported to a storage or holding area on the pier, wharf, or terminal adjoining navigable waters.* The employees who perform this work would be covered under the bill for injuries sustained by them over the navigable waters or on the adjoining land area. *The Committee does not intend to cover employees who are not engaged in loading, unloading, repairing, or building a vessel, just because they are injured in an area adjoining navigable waters used for such activity.* Thus, employees whose responsibility is only to pick up stored cargo for further trans-shipment would not be covered, nor would purely clerical employees whose jobs do not require them to participate in the loading or unloading of

cargo. However, checkers, for example, who are directly involved in the loading or unloading functions are covered by the new amendment. Likewise the Committee has no intention of extending coverage under the Act to individuals who are not employed by a person who is an employer, i.e. a person at least some of whose employees are engaged, in whole or in part in some form of maritime employment. Thus, an individual employed by a person none of whose employees work, in whole or in part, on navigable waters, is not covered even if injured on a pier adjoining navigable waters." (Emphasis supplied.)

What Is the Point of Rest

The NAS submits that the "storage or holding area on the pier, wharf, or terminal adjoining navigable waters" referred to in the Committee Reports is nothing other than the cargo's "point of rest"—a term and functional line of demarcation known throughout the industry. As we shall demonstrate, it is the "point of rest" to which cargo, whether in breakbulk or containerized form, is immediately transported after being unloaded from a ship.

The term "point of rest" is one that has long been used in the industry to delimit the function of loading and unloading vessels. References to the point of rest concept appear in federal regulatory agency decisions at least as early as 1929, when it was explained in connection with a matter concerning handling charges assessed by steamship companies for on-pier handling of cargoes. In *Associated Jobbers and Manufacturers* v. *American Hawaiian S.S. Co.*, 1 USSBB 161 at 165, the agency then responsible for enforcing the Shipping Act, 1916 (46 USC § 801 *et seq.*), and whose functions are now vested in the Federal Maritime Commission, stated:[8]

[8] See also: same case 1 USSBB 198 at 200 (1931).

"In reply to questions bearing on the details of handling at the Atlantic coast docks of these two carriers, the witness states: 'Our practice is to establish on the dock at places convenient to the several hatches of the steamer *piles of cargo* for each discharge port of the steamer so that the steamer can as soon as practicable be loaded in an equitable manner and properly trimmed and the delivery at the ports expedited.'" (Emphasis added.)

The location of the "piles of cargo" soon became known as the "place of rest" or "point of rest", and in 1935 the United States Shipping Board Bureau again addressed itself to the proper assessment of charges for moving cargo on piers between the vessel and pile, or place of rest, and stated:[9]

"In unloading vessels, sling loads of cargo are lowered to trucks on the wharf at ship's side provided by the stevedore, who then removes the cargo to the sheds or other place of rest, where it is set up in piles. In a sling load of general cargo there are likely to be a number of different commodities for various consignees, and even for a number of different ultimate destinations, which necessitates a certain amount of sorting. Similarly, in loading a vessel the carriers frequently assemble in a single sling load cargo delivered to the wharf by several shippers."

and

"According to respondents [common carriers by water] the transportation rate does not contemplate delivery at point of rest on the wharf beyond ship's tackle, but in the case of San Francisco the carriers feel justified in not assessing a charge for the movement between ship's tackle and point of rest due to alleged lower costs to them at that port. No specific reason is given by respondents for the absorption at

[9] *Assembling and Distributing Charge*, 1 USSBB 381 at 383, 384 (1935).

Portland, Seattle, and Tacoma of the charge for handling cargo between ship's tackle and point of rest."

The employees involved in moving the cargo between the ship's tackle and place (or point) of rest were, and are, longshoremen. On October 12, 1934, following a labor dispute on the Pacific Coast, the presidentially appointed National Longshoremen's Board handed down a decision which defined *longshore work* and the occupations involved.[10] The arbitrators' award [11] interpreting the existing labor-management contract stated:

"*Section 1.* Longshore work is all handling of cargo in its transfer from vessel to first place of rest including sorting and piling of cargo on the dock, and the direct transfer of cargo from vessel to railroad car or barge and vice versa.

The following occupations are included in longshore work: longshoremen, gang bosses, hatch tenders, winch drivers, donkey drivers, boom men, burton men, sack-turners, side runners, front men, jitney drivers, and any other person doing longshore work as defined in this section."

In 1939 the United States Maritime Commission, which had succeeded to the functions of the United States Shipping Board Bureau, addressed itself to the "point of rest" concept [12] noting that the steamship lines serving

[10] Wytze Gorter and George H. Hildebrand. *The Pacific Coast Maritime Shipping Industry, 1930-1948*, Volume II: An Analysis of Performance (Berkeley and Los Angeles, 1954 University of California Press), p. 189.

[11] 25—National Labor Relations Board, San Francisco Administrative File—Box 485, National Archives.

[12] *Los Angeles By-Products* v. *Barber S.S. Lines, Inc. et al.* 2 USMC 106 at 113 (1939). See also: *Status of Carloaders and Unloaders*, 3 USMC 116 (1949); *Carloading at Southern California Ports*, 3 USMC 137 (1949); and *Los Angeles Traffic Managers' Conference, Inc.* v. *Southern California Unloading Traffic Bureau et al.*, 3 USMC 569 (1951).

the Port of San Diego collected a charge for handling the cargo between ship's tackle and *point of rest* on the dock at said port, and stated:

> "It is clearly established by the record in these cases that it is impracticable to spot such equipment at shipside and receive and deliver the cargo direct at ship's tackle. It is conceded that such practice would result in undue delay and inconvenience, increased risk of injury and damage, and increased cost to all concerned, including the ship operator, the terminal operator, and the shipper or consignee. It is customary, therefore, to receive and deliver general cargo at place of rest on the wharf or in the transit shed, where it is placed after unloading from or before loading to rail cars, trucks, or river vessels or barges. The rail cars are usually spotted on the low-line tracks which are on the land side of the wharf, or at the finer type piers, on the apron outside of the shed with the shed between the low-line tracks and the ship. At some of the terminals these low-line tracks are depressed below the level of the wharf floor to facilitate the loading and unloading of the cars and the handling of the cargo between car door and place of rest. The loading and unloading of the rail cars is performed by the stevedores, or by independent companies, at all terminals except those at Stockton and the East Bay ports of Oakland and Alameda where this service is performed by the terminal employees. A separate charge is assessed against the shipper or consignee for this service. In some instances cargo is handled direct between car door and ship's tackle and in such cases both the car loading or car unloading charge and the handling charge are assessed. Trucks are usually loaded and unloaded in the transit shed by the employees of the trucking companies."

In 1965 the Pacific Coast Longshore Collective Agreement defined longshore work as "all handling of cargo in its transfer from vessel to first place of rest, and vice

versa, including sorting and piling of cargo on the dock, and the direct transfer of cargo from vessel to railroad car or barge, or vice versa. . . ." [13] Thus, it is clear beyond doubt that "longshoring operations" at Pacific Coast ports only included cargo handling operations between the vessel and the place of rest on the pier or directly into a railroad car or barge located at the place of rest. Regulatory agency decisions for a long period of years indelibly stamped on the minds of both management and labor the term "point of rest" and the functional separations of labor and employer which occurred when cargo reaches that point. In addition, the National Labor Relations Board has found that the function of container stuffing and stripping is not a traditional longshore function on the Pacific Coast and may be accomplished by a variety of labor unions and employers.[14]

The term and concept of "point of rest" was as well known on the Atlantic and Gulf coasts as well as the Pacific, but the regulatory agencies had no occasion to become involved in disputes similar to those on the Pacific Coast, as the charge for moving cargo between the vessel and the point of rest on the dock was not separately collected from the shipper by the steamship line or marine operator.[15]

On the Atlantic Coast, moreover, prior to the 1950's and the modernization of pier facilities at various ports, truck loading and unloading, as well as rail car loading unloading, were primarily performed by independent

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[13] Betty V. H. Schneider and Abraham Siegel, *Industrial Relations in the Pacific Coast Longshore Industry* (1956, Institute of Industrial Relations, University of California, Berkeley), p. 1.

[14] *Pacific Maritime Association* v. *National Labor Relations Board* 515 F.2d 1018, (D.C. Cir.) cert. den. 424 U.S. 942.

[15] *Los Angeles Traffic Managers, Inc.* v. *Southern California Carloading Tariff Bureau et al.*, 3 FMB 569 at 578, 579 (1951).

trucking companies or by railroad employees at railroad owned marine terminal facilities.[16]

In the Port of New York the situation concerning truck loading at marine terminals became so fraught with crime and malpractice that the states of New York and New Jersey were compelled to create the Waterfront Commission Compact approved by Congress.[17] In a report to the Governor, Attorney General and legislature of the State of New York dated May 20, 1953, the New York State Crime Commission described in some detail the various operations and persons involved at New York/New Jersey piers as follows:[18]

"BASIC PIER OPERATIONS AND PERSONNEL

The basic operations of a pier include the docking or sailing of the vessel, the unloading or loading of the cargo between the hold of the vessel and the floor of the pier, the checking of cargo on the pier, the protection of the cargo on the pier and in the vessel, the loading and unloading of cargo between the floor of the pier and trucks, and the maintenance of the pier.

The supervisory work is performed by pier superintendents; hiring foremen, who hire the longshoremen; dock bosses, who hire the checkers; and roundsmen or head watchmen, who hire the protective force.

The loading and unloading of vessels is done by gangs of longshoremen, under the immediate supervision of gang or hatch bosses. General work around the pier is done by longshoremen called extra labor.

Checkers take inventory of cargo on arrival and departure. Timekeepers keep track of the work time. Watchmen guard the cargo, the piers, and the docked vessels.

Public loaders are independent of the rest of the pier operation. Their function is to load and unload trucks. They operate variously as corporations, partnerships, or individuals."

The Crime Commission also described in some detail the truck loading operations in the Port as follows:[19]

"V. THE PUBLIC LOADING RACKET IS A SERIOUS DRAIN ON THE PORT

'Public loading' has come to mean the moving or lifting of cargo from a pier and stacking it in the truck and also the reverse operation.

Years ago truckdrivers loaded and unloaded their own trucks at the piers. Occasionally individual loiterers were hired to assist. Gradually, groups of men came to establish themselves at particular piers, and to insist upon being hired to load the trucks, regardless of whether the truckdriver desired their services.

The steamship and railroad companies have always declined to assume the responsibility for loading and unloading trucks at their piers. On the other hand, the trucking companies, through their trade associations, have maintained that the steamship and railroad companies should assume this responsibility.

This impasse has resulted in default to the groups of public loaders that have come to infest the piers, and who claim prescriptive rights to be paid for the

[16] *Free Time and Demurrage Charges at New York*, 3 USMC 89 (1948); *Pennsylvania Motor Truck Association et al.* v. *Philadelphia Piers, Inc. et al.*, 3 FMB 789 at 791 (1952).

[17] Public Law 252, 83rd Congress (approved Aug. 12, 1953.)

[18] *New Jersey-New York Waterfront Commission Compact*, hearing before Subcommittee No. 3 on the Committee of the Judiciary, House of Representatives, 83rd Cong., 1st Sess. on H.R. 6286, 6321, 6343 and S.2383, July 22, 1953 Ser. #6 at p. 167.

[19] *Ibid.*, p. 187.

loading of trucks. With few exceptions, therefore, the loading at each pier or group of piers is controlled by a group of loaders whom truckmen must employ and pay to load trucks regardless of whether the loaders do any work, are needed, or are unwanted."

In an answer of the International Longshoremen's Association to the allegations and charges of the Crime Commission dated June 25, 1953 the union also submitted its description of waterfront and truck loading operations in the Port:[20]

"1. THE SERVICES PERFORMED BY PUBLIC LOADERS ARE VITAL AND NECESSARY TO THE FLOW OF COMMERCE THROUGH THE PORT

A great deal has been said and written on the subject of public loading. Much of it reveals complete ignorance of the subject. To clarify the facts, we should like to set forth briefly what public loading is.

A public loader is a man, one of a group of men, who are found on the piers and who load freight from the pier to the trucks, which cart it away. He is one of the human links on the chain that brings waterborne cargo into the cities of the port of New York. There are three principal links in this chain. First is the longshoreman who unloads the freight from the ships and places it on the pier. Second is the man who loads the freight from the pier onto the truck that will take it to its destination. Third, of course, is the truck. Unloading from the boat and loading from the piers are both longshore operations which are performed by members of the ILA, except in those rare instances where this work of loading is traditionally done by members of other unions.

[20] *Ibid.*, p. 230 and 231.

Clearly, then, loading is a necessary service, which must be paid for. There is work to be done, hard work, and somebody has to do it. The public loaders, members of the ILA are that somebody.

As the name indicates the public loaders do not work for any single, particular employer, but for the public; in this case, the truckers. They do not receive a wage or a salary. They are paid by the truckers whose trucks they load, on the basis of stipulated rates fixed by collective bargaining.

The public loaders work as groups. They divide the available work among themselves, usually on an equal basis. However, on occasion, cargo receipts on a given pier may be so heavy that the group of public loaders which work on that pier is unable to move the cargo from the pier to the trucks as speedily as the truckmen would like. When that happens the group hires longshoremen to assist in the work. Sometimes when one of the public loaders drops out of the group for some reason, a longshoreman who has had some experience as an extra worker with these groups, moves in and becomes a regular member of the group.

* * * *

We do not think the commission itself disputes the fact that the services rendered by the loaders are necessary ones. These men came into existence to fill a void. Steamship and stevedoring companies in the past, as at present, were unwilling to assume the task of loading cargo from piers to trucks. Truckmen on the other hand had neither the equipment nor the labor supply to perform this work. Consequently, men were hired on a piecework basis to do the job and these were the men who eventually became attached to the pier in the capacity of public loaders."

With the approval by Congress of the New Jersey-New York Waterfront Commission Compact (Public Law

252—83rd Cong., approved August 12, 1953), the public loaders and unloaders of trucks in New York were outlawed and truckers and terminal operators negotiated implementation of the Compact. As a result, the New York Terminal Conference was formed with the approval of the Federal Maritime Board which had now assumed the functions of the United States Maritime Commission, and rates to be charged to shippers for the service of loading and unloading trucks were established. It was agreed that truck loading and unloading would be accomplished by marine terminal operators in the Port but the trucker would have the right to load and unload its own trucks. In actual practice thereafter the terminal operator loaded most of the trucks which called at the port's piers while the truckers performed a substantial portion of truck unloading.[21] To this day truckers in the Port still may and do unload their own trucks.

While the marine terminal operator was obliged to employ members of the longshoremen's union when they loaded or unloaded trucks in the Port, that function did not become a maritime function and, in fact, never was a maritime employment or longshoring operation. As it did concerning the Pacific Coast container stuffing and stripping dispute, the National Labor Relations Board could not find that such functions were traditional longshoring operations but that the traditional work of the longshoreman was to load and unload ships.[22]

In all major ports of this country the movement of goods or merchandise, be it in breakbulk form or con-

[21] *Empire State Highway Transportation Association* v. *American Export Line et al.*, 5 FMB 565 (1959).

[22] *New York Shipping Association, Inc.* v. *National Labor Relations Board et al.*, 537 F.2d 706 (2nd Cir. 1976), petitions for cert. filed under the same name, #76-569 and #76-570, cert. denied Jan. 10, 1977.

tainerized,[23] enters in or leaves the port in two distinct steps. For import cargo the first is the unloading or discharge of the cargo from the vessel to the pier. This work is performed by independent stevedore contractors or steamship companies who employ workers called longshoremen to perform this function. In most ports on the Great Lakes, the Atlantic Coast and the Gulf Coast these workers have been organized by the International Longshoremen's Association. In some ports on the Great Lakes workers who perform longshore operations are members of other unions such as the United Steelworkers of America and the Brotherhood of Teamsters. On the Pacific Coast most longshoremen are members of the International Longshoremen's and Warehousemen's Union. The cargo is then immediately moved away from the vessel to the point of rest, place of rest, pile or marshalling area on or in the terminal. One of the reasons for the immediate movement of the cargo to the point of rest is to clear the area immediately adjacent the vessel so that vessel unloading operations may continue. This movement of the cargo is also performed by the independent stevedore contractor or the steamship company employing workers who perform longshoring operations. In all cases the workers who perform the actual vessel unloading and transfer of cargo to the point of rest are members of the same crew of workers referred to as the ship's gang, longshore gang, or deep sea gang.

The second step is the removal of the cargo away from the point of rest and off the pier.

[23] In modern day maritime parlance breakbulk cargo means individual pieces or packages of cargo which are loaded separately; and containerized cargo means individual packages or pieces of cargo which are placed into a shipping van or container having standard dimenstions of 8′ x 8′ x 20′, 8′ x 8′ x 35′, or 8′ x 8′ x 40′. The cargo vans or containers are capable of being transported by ship or mounted on wheels (chassis) and either driven by truck or carried by rail car.

In the case of export cargo, it is placed at the point of rest prior to loading onto the vessel and the process is reversed.

Import cargo at the point of rest, whether undercover in a terminal transit shed or warehouse, or in an open marshalling or storage area, remains there until called for by the consignee. Customary practice is to allow the consignee a period of time called "free time" during which the cargo may remain at the pier without additional charge. At the expiration of allowable free time, terminal storage fees are assessed against the cargo in accordance with terminal tariffs filed with the Federal Maritime Commission.[24]

Any further handling of the cargo is performed by the marine terminal operator, who is not a party to the maritime contract of carriage. In many ports the marine terminal operator may also be an independent stevedore contractor and provide services to the vessel and receive payment therefor from the vessel operator. In many cases, the employees of the stevedore contractor and the terminal operator may be members of the same union. In some instances, although members of the same union, the terminal or warehouse worker may be the member of a separate local unit of the union and is paid a different wage rate than the members of the ship's gang. In the port of Norfolk, Virginia, for example, the man who works in the warehouse is called a "shortshoreman." In some ports the warehouse worker may be a member of an entirely different union than the worker who loads the vessel.

In still other ports the warehouse or terminal operations are performed by public entities such as state port

[24] *North American Smelting Co.* v. *Moller S.S. Co.*, 204 F.2d 384, 386 (2 Cir. 1953), *National Packaging Corporation* v. *Nippon Yusen Kaisha*, 354 F. Supp. 986, 987 (N.D., Cal. 1972), and *Kinderman* v. *Nippon Yusen Kaisha*, 322 F. Supp. 939 (ED, Pa. 1971).

authorities or municipal governments[25] whose workers are by law excluded from the coverage of the LHWCA.[26] Injuries to those employees are compensated pursuant to the provisions of applicable state workmen's compensation laws. The charges for services performed by such employees, as is in the case of a private terminal operator, are assessed in accordance with terminal tariffs filed with the Federal Maritime Commission as prescribed by its rules and regulations. Those rules and regulations appear at 46 CFR Part 533 and were initially proposed by the Commission's predecessor, the Federal Maritime Board, in 1959.

In 1962 the Commission promulgated uniform definitions to be observed by marine terminal operators (27 FR 12777) and following a court challenge[27] were made effective July 14, 1967. Those regulations define the terms "free time," "terminal storage," "wharf demurrage," and "handling at point of rest." The last two specifically refer to the point of rest and indicate that it is the place on the terminal facility to which the Committees refer in their reports, *supra*. Those definitions are:[28]

> "(c) For the purpose of this section, 'point of rest' shall be defined as that area on the terminal facility which is assigned for the receipt of inbound

[25] For example, port facilities operated by Davisville, Rhode Island; South Jersey Port Corporation at Camden; North Carolina State Ports Authority at Wilmington and Morehead City; South Carolina State Port Authority at Charleston; Jacksonville, Florida Port Authority; City of Pensacola, Florida; and Alabama State Docks at Mobile.

[26] 33 USC § 903(a)(2); *Bagrowski* v. *American Export Lines et al.*, 305 F. Supp. 432 (USDC, ED Wis. 1969) reversed on other grounds 440 F.2d 502 (7th Cir. 1970).

[27] *Alabama Great Southern Railroad Co. et al.* v. *Federal Maritime Commission*, 379 F.2d 100 (D.C. Cir. 1967).

[28] 46 CFR 533.6(c); 46 CFR 533.6(d)(5) and (6).

cargo from the ship and from which inbound cargo may be delivered to the consignee, and that area which is assigned for the receipt of outbound cargo from shippers for vessel loading."

"(d) (5) Terminal storage: The service of providing warehouse or other terminal facilities for the storing of inbound or outbound cargo after the expiration of free time, including wharf storage, shipside storage, closed or covered storage, open or ground storage, bonded storage and refrigerated storage, after storage arrangements have been made.

(d) (6) Handling: The service of physically moving cargo between point of rest and any place on the terminal facility, other than the end of ship's tackle."

Thus, the Federal Maritime Commission and its predecessor agencies have always recognized the concept of point of rest and the separation of longshoring and terminal operations. In *Truck and Lighter Loading and Unloading Practices at New York Harbor*, 9 FMC 505, 511 (1966) the Commission observed:

> "The Examiner would define stevedoring, in the case of import cargo, as one process of breaking cargo out of stow in the ship's hold, lifting the cargo from the vessel and depositing it on the pier's stringpiece and then carting it by hilos to the place of rest designated by the stevedore. In the case of export cargo the process is reversed beginning at the place of rest and ending in the vessel's hold . . . We think the Examiner's conclusion here is correct."

The point of rest is completely consistent with the Secretary of Labor's understanding of the term "longshoring operations" in 1972 in that Occupational Safety and Health Administration regulations in effect at the time [29] defined that term to mean:

[29] 29 CFR 1918.3(1).

> "the loading, unloading, moving or handling of cargo, ship's stores, gear, etc. into, in or out of any vessel on the navigable waters of the United States."

The concept of point of rest has such universal significance as to be recognized by academicians who conducted a socio/economic inquiry into the maritime industry as relating to Negro employment.[30] In the book which resulted from their research appears the following quotation which discussed how container and breakbulk cargo is handled in ports of the United States:[31]

> "Generally, cargo arrives on the pier by truck or by railroad car several days prior to its scheduled loading aboard ship. When the cargo is delivered to the terminal, it is separated, grouped, and stored in the marine terminal adjacent to the dock loading area. Once placed in temporary storage, the cargo is said to be in its 'last place of rest.' Up to this point, the work is generally performed by truck drivers, helpers, and warehousemen, although in some ports it is feasible for longshoremen to perform these functions.
>
> Typically, longshore work begins with the movement of cargo from this 'last place of rest,' combining the efforts of three separate units of dock, deck, and hold gangs, which comprise the larger longshore gang. In the storage area ashore, dock workers place the cargo on pallets in preparation for loading. Tractors or forklift operators move these pallets from the warehouse to dock side and place them within reach of the ship's cargo handling gear. . . ."

As recently as December 15, 1976, the Assistant Secretary of Labor for Employment Standards forwarded

[30] Lester Rubin, William S. Swift and Herbert R. Northrup, *Negro Employment in the Maritime Industries*, Volume VII-Studies of Negro Employment (1974, Industrial Research Unit, The Wharton School, University of Pennsylvania). Part Two.

[31] *Ibid.*, Part Two, Chapter II, p. 10.

a report to the Secretary of Labor on the "Longshore and Harbor Workers' Compensation Program" prepared by the Office of Workers' Compensation Programs (OWCP Task Force) concerning the myriad of matters and problems surrounding the Department of Labor's administration of the LHWCA. In Appendix B-1 of the report (p. 103-107) the Department of Labor describes with a fair degree of accuracy the "nature and character of the longshore industry" which includes recognition of the point of rest concept and the division of functions and employment which it delineates. The report also acknowledges the fact that in most ports stevedore contractors and marine terminal operators are separate and unrelated jobs. The report goes on to acknowledge that stevedore operations are confined to the area between the ship and the terminal area called the "point of rest." [32]

Finally, the term point of rest and the concept it represents have also been recognized in cases decided in the courts. Most noteworthy is a Court accepted stipulation between labor and management in the case *International Longshoremen's Association, AFL-CIO* v. *North Carolina State Ports Authority*, 332 F.Supp. 95 (E.D. N.C. 1971). In that litigation involving union organization among state employees, counsel for the parties entered into two very significant stipulations. In effect, those stipulations showed a clear agreement as to the meaning of "point of rest." The precise language of those important stipulations are set forth below:

> "7. All in-bound freight which is shipborne is unloading by stevedore company employees (longshoremen) onto the dock and is placed in transit sheds, apron or adjacent ramp, called a 'point of rest.' At no point do State Port Authority employees load

[32] The full text of Appendix B-1 is annexed hereto as Appendix A. See also, Philip Ross, *Waterfront Labor Response To Technological Change, A Tale of Two Unions*. Labor Law Journal (1976) pp. 397, 398.

> or unload directly from a ship. Once commodities or frieght is unloaded by the stevedore company employees, it is placed by them in transit sheds, open areas or adjacent ramps. From this point on, it may be taken to a warehouse or other storage location by employees and equipment of the Authority or it may be loaded from the transit sheds, open dock areas or adjacent ramps into truck or rail cars for outbound shipment.
>
> 8. As to incoming freight unloading from railroad or truck, this is done by Ports Authority employees. Such freight may first go to warehouses and subsequently be moved by Authority employees to transit sheds, or open storage areas, or it may be moved directly to transit sheds or dock areas where it is then placed aboard ship by stevedore company employees for outbound shipment." (Ibid. at 97)

The above case was reviewed and affirmed by the Fourth Circuit Court of Appeals at 463 F.2d 1 (1972), cert. den. 409 US 982 (1972).

The Lash Operation

In the LASH operations referred to in the Committee Reports, *supra* the point of rest and its attendant delineation of job functions and employers is of equal application as in the case of breakbulk operations previously described. The term LASH is an acronym for Lighter Aboard Ship, which simply means that cargo is placed in special uniform size "lighters," or barges, which are called LASH barges to differentiate them from river barges. The LASH barges are towed from the loading port to the location of the LASH vessel, which is sometimes called the mother ship. The barges are mechanically loaded by a crane on the mother ship and are stacked in specially constructed holds in the mother ship. The actual stowage or unstowage of the barges with their contents in the mother ship requires substantially fewer

longshoremen than does the loading of cargo into a breakbulk type ship. A very similar type of operation called SEABEE differs from the LASH operation described only in the size of the barge and the mechanical means for loading or unloading the barge onto or from the mother SEABEE ship.

The actual loading of the barges is performed by longshoremen in precisely the same manner traditionally employed in the loading or unloading of a breakbulk ship. However, in most instances the size of the longshore gang involved in LASH and SEABEE operations is smaller than the regular ship's gang primarily because of the smaller size of the barge. The barges are in fact vessels and ply the navigable waters of the United States and may be loaded or unloaded at any inland or coastal waterfront facility. For example, a LASH barge may be loaded in Chicago at any suitable facility and towed to New Orleans to be loaded onto the mother vessel. Conversely, the mother ship may discharge a loaded barge in New Orleans and then the barge may be towed to St. Louis (or any other river port) and unloaded there at any suitable facility.

Workers who actually load or unload the barges are engaged in traditional longshore operations and if injured while so engaged would obviously be entitled to the benefits of the LHWCA unless their employer were a state, municipal or other public political entity. Workers on the shore who perform truck loading, unloading or other traditional operations shoreward of the point of rest would not be longshoremen nor engaged in maritime employment and would be entitled to only state workers' compensation benefits under state law.

Containerized Cargo

As has been demonstrated, the advent of the LASH vessel may have reduced the number of longshoremen

loading vessels at coastal seaports. The capability of the LASH barges to travel the inland waters freely and to be loaded or unloaded at virtually any waterfront faciilty has resulted in increased utilization of labor both on the land and on the navigable waters.

As to containerized cargo one author has noted:[33]

> "The container revolution—that is, the transportation of water-borne commerce in preloaded containers suitable for overland transportation—began in the late 1950's on the major domestic trade routes (West Coast to Hawaii, Northwest to Alaska, and East Coast to Puerto Rico). After some delay, containerization was introduced into foreign trade, first by U.S. firms and more recently by foreign shipping companies."
>
> "Although it is a major innovation in shipping, containerization is a fairly simple concept based on a systems approach to cargo handling. Unlike conventional break-bulk cargoes that must be handled as individual items, container cargoes move from point of origin to final destination as a single unit, utilizing large boxes which are typically 8 feet square at the end and 20 to 40 feet long."

In a typical container operation involving import cargo the containers are lifted from the ship by a specially constructed shore-based container crane and landed on the terminal property alongside the ship either directly to the ground or onto a set of wheels. The container is then immediately moved to the container storage or marshalling yard. If the container has been mounted on wheels it is connected to a motor vehicle sometimes referred to as a "hustler." If the container has not been mounted on wheels it is picked up by a specialized piece

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[33] William Burke, *On the Waterfront*, Federal Reserve Bank of San Francisco, Monthly Review Reprint/October 1972, p. 17, 18, and 22.

of equipment sometimes referred to as a "hi-lo" (straddle carrier or forklift). When the container has been placed in the marshalling yard the vehicle operator returns to shipside to transport another container to the marshalling yard or point of rest. The workers who transport the container between the vessel and the point of rest or marshalling yard are longshoremen employed as a part of the ship's gang. In the case of export cargo the procedure is reversed.

At the point of rest or marshalling yard the container remains until it is called for by the consignee or until it is to be moved for transportation to inland destinations. If the container is to be moved inland away from the port area, the only additional handling of the container and its contents at the terminal is (a) to connect it to over-the-road motor units, or (b) to place it on a railcar, or (c) to place it upon a chassis or other wheeled device supplied by the inland carrier.

Once the containers have reached their inland destination their contents are removed ("stripped") by labor employed by the consignee or a freight consolidator. In the case of containers for export commerce the process is reversed and the fully loaded ("stuffed") container is placed at the marshalling area or point of rest to await loading onto the vessel. Obviously, the same procedure may be followed for containers whose contents are destined to or originate in the port area.

Alternatively the container may be stuffed or stripped on marine terminal property in the same manner as at inland facilities. In those instances the containers are stuffed or stripped in a warehouse structure, sometimes referred to as a "transit shed" or "stuffing and stripping shed." The workers in these instances are warehousemen or terminal workers employed by the terminal operator. They are not a part of the ship's gang and their employment does not involve any work on a vessel or

in any activity occurring between the point of rest and the vessel. In many ports those who work in the terminal warehouse are members of the same union as those who work in the ship's gang (longshoremen). Regardless of where container stuffing and stripping is performed and regardless of the employer involved, the function, purpose and degree of the risk are the same. Thus, the employee of a manufacturing company who stuffs or strips a container at an inland facility miles away from the navigable waters is performing the identical work and is subjected to the identical risk as one working in a marine terminal. The fact that one may call himself a longshoreman or happens to be the member of a longshore union does not change the nature of the work nor render it maritime.[34]

The Economic Impact of the 1972 Amendments

The impact of the 1972 amendments to the LHWCA upon the stevedoring and marine terminal industry as well as other affected industries was swift, certain and extremely costly. As one could anticipate, the cost of securing insurance to cover the employer's liabilities under the amended Act immediately soared. Section 32 of the Act[35] requires that persons engaged in stevedoring must secure adequate insurance coverage or self-insure themselves with the approval of the Secretary of Labor. The failure to do so means that stevedoring services may not be lawfully rendered.[36] Generally, insurance premium charges assessed by commercial carriers are stated

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[34] A detailed description of stevedoring and terminal operations at most ports of the United States which was before the Fourth Circuit Court of Appeals in *I.T.O. Corporation of Baltimore* v. *Adkins et al., supra,* may be found in the Appendix to the NAS memorandum in response to the Petition for a writ of certiorari in *Adkins* v. *I.T.O. Corporation of Baltimore* (No. 76-730).

[35] 33 USC § 932(a).

[36] 33 USC § 937.

as a percentage of payroll. Prior to the 1972 amendments the nationwide manual premium for the underwriting category of general stevedoring was approximately $17 per $100 of payroll, or 17% of payroll. By September 1975 the nationwide average had risen to $28 (or 28% of payroll) with individual state ratings ranging from 13.46% to 41.85%. At that time in fourteen states the rating exceeded 30% of payroll while in eight others the rate was in excess of 20%. For the underwriting category of container stevedoring the pre-1972 average rating was 9.3% and by 1975 had risen to 15.8%.[37]

At the same time the number of claims reported to the Department of Labor soared from 72,087 in 1972 to 151,274 by the end of 1974. The number of lost time injuries reported increased in the same period from 17,667 to 32,944. An analysis of this phenomenon by the Comptroller General of the United States in 1976 [38] which studied injuries reported from February 1973 through June 1974 showed that of the 186,336 reported during that period some 86,325 (or 46%) occurred in areas to which the Department of Labor felt that coverage had been extended by the 1972 amendments.

In the recent OWCP Task Force Report, *supra* it is indicated that the Department of Labor's cost of administering the LHWCA had risen from a figure of $1,394,-

[37] *The Journal of Commerce* (New York), Monday, September 22, 1975. "Stevedores Seek Court Ruling to Clear Compensation Muddle" Thomas D. Wilcox. The actual premium paid by individual companies may be greater or less than manual depending upon individual companies' experience and underwriting rating.

[38] *Improvements Needed In Administration Of Benefits Program For Injured Workers Under The Longshoremen's And Harbor Workers' Compensation Act*, Report to the Senate Committee on Labor and Public Welfare by the Comptroller General of the United States, Jan. 12, 1976.

000 in 1973 to $2,553,885 in 1976.[39] That report also indicates that from 1972 to 1976 maximum compensation rate for longshoremen covered by the Act increased by 358% and that compensation and medical benefits paid from calendar year 1972 through 1975 increased from $33 million to $88 million and that there was a 149% increase in the number of cases compensated.[40]

The combination of skyrocketing levels of compensation payment, the number of claims for which payment was sought, the uncertainty of the scope of federal jurisdiction, and other market forces vastly restricted the availability of insurance. For example, it has been reported that in the Seattle area only two companies were writing LHWCA insurance in 1976 compared with twenty-five companies that had been writing it in the past.[41] One employer in the Seattle area was quoted in that article as saying:

> "But since we are small our broker * * * can't get anyone to take it. And I can't run my business without it because the government says we must have it.
>
> But if I can't get a renewal I'm out of business on the waterfront. Our employees will be hardship cases. When employed they make a decent wage."

The article goes on to state that the employer felt it would lose business because the shipowner would go to California where the state provided insurance that covered longshore and harbor workers.

In other instances several insurance companies have terminated insurance coverage of employers thus requir-

[39] OWCP Task Force Report, *supra*, p. 81.

[40] *Ibid.*, p. 45.

[41] *Dock Workers Comp Costs Seen As Critical Problem*, "Business Insurance," ((Crain Communications, Inc., week of November 10, 1976).

ing that the employer either become self-insured if it has the financial resources, seek insurance from an assigned risk pool at a high rate, or go out of business. In a "Special Report of the Waterfront Commission of New York Harbor Concerning Fraudulent Workmen's Compensation Claims in the Port of New York-New Jersey" of December, 1976 the Waterfront Commission reported to the Governors of the States of New York and New Jersey that (p. 27):

> "The cost of Workmen's Compensation in Brooklyn has reached such astronomical proportions that a major stevedoring company was compelled to stop doing business in Brooklyn and to move its entire operation to New Jersey."

The report also states at p. 26 that in the Port of New York a new waterfront employer must typically pay insurance premiums as per the manual of 31.3% of payroll. However, the report also indicates on the same page that the average premium actually paid with experience ratings included is in the area of 40-45% [42] of payroll.

The recent report of the OWCP Task Force, *supra* has recognized this problem and its comments are what appear in Appendix B of this brief.

While the stevedore employers struggle for economic survival and the securing of insurance for their operations between the vessel and the point of rest, the private marine terminal operator now faces an additional competitive challenge from its publicly operated competitor as the LHWCA crosses over the point of rest and into the marine terminal. One of the stated intents of the Congress was to permit a uniform compensation system to apply to employees who would otherwise be covered

[42] See also: *Administration of the Federal Employees' Compensation Act*, Thirty-Ninth Report by the Committee on Government Operations, Union Calendar No. 877, House Report No. 94-1757, 94th Congress, 2d Sess., at pg. 9.

by the Act for part of their activity. The Committees did not intend to cover employees not engaged in loading or unloading vessels just because they are injured in an area adjoining navigable waters used for such activity.[43] If coverage of the LHWCA is extended beyond the point of rest and into terminal or warehouse operations, employees, none of whose activities would otherwise be covered by the Act, would become entitled to LHWCA benefits *only* if they were employed by private companies. If employed by state port authorities or municipal entities they would not be entitled to LHWCA benefits and the intended uniformity of the compensation system is destroyed.

The economic injustice caused by the uneven application of the LHWCA can be readily demonstrated by considering events which transpired in the State of Texas shortly after the U.S. Court of Appeals for the Fifth Circuit handed down a decision in which two judges found that LHWCA coverage extended to warehouse or terminal workers.[44] On October 20, 1976 the insurance carrier providing the bulk of LHWCA insurance in the State of Texas and other Gulf ports notified its policyholders that because of the recent decision of the Court it would be necessary to increase the premium charges for warehouse employees, freight handlers and other shoreside personnel. Policyholders were also advised that the coverage and increased premiums would be applied to include movement of cargo within the warehouse as well as into and out of the warehouse even when no ships are in port. Shortly thereafter, at the request of the insurance carrier, the Texas Insurance Commission approved a rate increase from 13.37% of payroll to

[43] Senate Report 92-1125, 92nd Cong., 2nd Sess., p. 13; House Report 92-1441, 92nd Cong., 2nd Sess., p. 11.

[44] *Perdue* v. *Jacksonville Shipyards, Inc.*, 539 F.2d 533, petitions for cert. pending.

25.31% of payroll effective January 1, 1977. In December of 1976 the Port of Beaumont, Texas sent a notice "To Our Valued Customers" who were subscribers to the Port of Beaumont's terminal tariff on file with the Federal Maritime Commission.[45] That notice stated:

> "Effective January 1, 1977, Workmen's Compensation Insurance covering International Longshore Warehousemen at the Texas Gulf Ports will be increased by 15.32%. This will increase the pay scale for Warehousemen by $2.00 per hour. Port of Beaumont regrets that this increase in Workmen's Compensation necessitates an increase of approximately 7.08% in Port's Handling Charges."

On December 27, 1976 the Port of Beaumont filed with the Federal Maritime Commission a general rate increase to be assessed against the public for the handling of cargo at privately operated terminal warehouses. Since the increase in insurance costs approved by the Texas Insurance Commission and followed by other Gulf states does not apply to publicly operated terminals or warehouses, the immediate disadvantage to the private operator clearly not intended by the Congress is easily discernible.

CONCLUSION

As was succinctly stated by counsel for petitioners Northeast Marine Terminal Company, Inc. and State Insurance Fund, citing decisions of this Court—"In law, as in life, lines have to be drawn" [46] "and the constant business of the law is to draw such lines." [47] In 1972 Congress drew two lines. In amending the definition of "employee" in section 2(3) of the LHWCA it drew a line between all "employees" and employees "engaged in

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[45] Port of Beaumont Terminal Tariff #T-4-H.

[46] *Pearce* v. *Commissioner*, 315 U.S. 543, 558 (1942).

[47] *Dominion Hotel* v. *Arizona*, 249 U.S. 265, 269 (1919).

maritime employment, including any longshoreman or other person engaged in longshoring operations." Congress also moved the line separating federal from state jurisdiction shoreward from the water's edge to "any adjoining pier, wharf, dry dock, terminal * * * or other adjoining area customarily used by an employer in loading, unloading * * * a vessel."

The NAS believes that those lines should be drawn where vessel loading begins, and where vessel unloading ends, at the "point of rest" on the pier. Both longshoring operations and vessel loading and unloading are performed only between the "point of rest" and on the vessel at the water's edge. The two identical committee reports plainly indicate that Congress intended to limit the type of employment entitled to LHWCA benefits as well as to limit the shoreside area in which injuries were compensible by the federal statute. It is clear that rail car or truck loading functions are not employments to which the LHWCA applies and that Ralph Caputo was not to be entitled to LHWCA benefits for the injury he sustained any more than was the trucker he was assisting on the day of his injury.

It is equally clear that Carmelo Blundo was not engaged in an employment that Congress intended to be subject to the LHWCA when he slipped and fell on the ice. The location of his accident was not one customarily used by his employer to load or unload vessels, and the container or shipping van with which he was working had been unloaded from a ship by another group of men working for another employer at another location. Nothing in the committee reports even hints at the suggestion that Congress intended to extend the coverage of the LHWCA through the streets of New York several days after unloading of the vessel had been completed.

The NAS agrees with Judge Friendly's observation that "it is not enough that a claimant calls himself a longshoreman or that a longshoreman's union in a particular port has forced employers to hire its members for such unlongshoreman-like positions as clerks or guards." [48] Ralph Caputo was engaged in such an "unlongshoreman-like" employment in a truck, and Carmelo Blundo was similarly occupied in watching the stripping of a container, a function no more hazardous or maritime than the clerks or guards to which Judge Friendly refers.

Finally, the dissent of Judge Lumbard sums up most concisely the logic and necessity for drawing the jurisdictional line at the point of rest wherein he stated: [49]

> "I agree with Judge Winter that "[t]he 1972 extension of coverage was intended only to remove inequities and anomalies arising when a person otherwise engaged in 'maritime employment' was injured on land," 529 F.2d at 1081, and with his additional statement that ". . . with respect to longshoremen or other persons engaged in longshoring operations, the Amendments extend only to those employees engaged in loading and unloading activities between the ship and the first (last) point of rest, including checkers 'directly involved in [such] loading or unloading functions,'" 529 F.2d at 1088.
>
> It is more in keeping with the realities of maritime employement to draw the line at the first point of rest in discharging the cargo and at the last point of rest in loading a vessel. Moreover, such a rule is far easier to apply and avoids claims such as that put forward by Dellaventura that he is entitled to compensation for his injury while loading a consignee's truck with coffee bags which had been stored in a warehouse for 133 days after being removed from the ship CAMPECHE. This being so, it seems to me that the interpretation adopted by the Fourth Circuit is more consistent with what the Congress intended and with the language of the 1972 amendment."

[48] Pet. A. pg. 33a.

[49] Pet. A. pg. 43a.

For these reasons then, the NAS respectfully urges this Court to reverse the judgments below.

Respectfully submitted,

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APPENDICES

APPENDIX A

NATURE AND CHARACTER OF THE LONGSHORE INDUSTRY

Studying the longshore industry means looking at such factors as shipping fleets, ports, marine terminal operators, stevedores, the nature of various occupations, technological advances in ship design, cargo packaging and handling, management organizations, unions, and labor management relations.

The major merchant fleets of the world in 1975 numbered 22,591 ships, with 583 of these ships belonging to the United States (see Figure 1, Major Merchant Fleets of the World, and Figure 2, U.S. Oceangoing Merchant Marine). Consequently, the vast majority of the ships on which longshoremen work are foreign flag ships manned by foreign crews.

Port efficiency continues to be a major concern of the maritime industry. Piers must constantly be upgraded to provide more spa both horizontally and vertically, to prevent overcrowded docks that can cause a 15 to 20 percent drop in movement of goods. Specialized cargo handling equipment must constantly be maintained and upgraded to speed the loading and unloading process, the transportation systems leadings into and out of the port must be free of congestion, and proper security must be provided to reduce pilferage (see Figure 3, U.S. Ports, Figure 4, Principal U.S. Ports in Foreign and Domestic Commerce, and Figure 5, Volume of Cargo Handled by U.S. Ports in 1973).

The marine terminal operator, who may own or lease the terminal property, is responsible for the safe handling of the ship, the delivery and receipt of the ship's cargo, and all movement and handling of that cargo between the point-of-rest and any place on the marine terminal prop-

erty except to shipside. The terminal property includes heavy lift cranes, forklift trucks, straddle carriers, platform trailers, and other equipment. In most ports, stevedore contractors and marine terminal operators are separate and unrelated jobs.

A stevedore or stevedore contractor is responsible for loading or unloading a ship in port by contract with a shipowner, agent, or charter operator. In the past, the stevedore, as the employer of the longshoreman, was a labor broker with little financial investment beyond providing safety and primitive cargo handling equipment. Currently, the stevedore has a substantial financial investment in such cargo handling equipment as forklift trucks, newsprint roll handling equipment, trailers for the placement of cargo containers, bulldozers, payloaders, and other machinery.

Stevedore operations are confined to the area between the ship and the terminal area called the "point of rest." This is the area close to the ship being loaded or unloaded where cargo is placed before delivery or further handling by the owner or operator of the marine terminal.

Most stevedoring companies are small firms providing technical knowledge and supervision of cargo loading and unloading. Small ports typically have 1 or 2 stevedoring or terminal companies, while larger ports may have as many as 15 privately owned firms. Because ship arrivals are irregular, a stevedoring company may work several ships or none at all on any given day; consequently, the demand for labor varies widely from day to day.

Longshoremen work in a gang or crew distributed between the ship and the pier so they can move cargo in an uninterrupted flow. A longshoreman may be designated by the equipment he operates—i.e., winchman or

hustler operator, or by the area in which he works—i.e., holdman. An average gang consists of 1 foreman, 6 to 10 men working in the hold of the ship, 1 hatchtender, 2 winchmen, and 6 to 8 truckers. The longshore gang varies from 12 to 20 workers for break bulk (historically, the typical gang) to varying numbers for specialty work on bulk, containers, and unitized loads.

For example, the typical break bulk gang in the port of Philadelphia is composed of 20 men: 15 regular and 5 new men. Nine to 12 are holdmen. Three of the best and most experienced are deckmen: one winch operator, one hatch man giving the signals, and one relief person. Four gang members are dockmen: two doorway men, who hook and unhook loads, and two forklift operators. One gang member, hired by the stevedoring company, serves as the foreman and hires the other gang members.

Other longshoremen working on the dock, usually older or disabled workers, include the gearman, who operates a forklift to bring supplies to the gangs, and the waterboy, who provides water for the gangs. Longshoremen may also work as crane operators, drivers of vehicles going on and off ships, baggage handlers on pleasure ships, and as positioners and fasteners of hose lines to ship tanks for loading or unloading liquid cargo.

Good physical condition is the only entry level requirement for longshore work. Informal on-the-job training is provided for new men by the more experienced longshoremen, and the work is usually learned in a few weeks. The wage rate is excellent for longshore work (see Figure 6, Longshore Straight Time Hourly Wage Rate), but the industry is declining because of mechanization (see Figure 7, Longshore Manpower Normally Available). Safety continues to be a problem, but the accident rate is declining as handling is mechanized. In 1971 the accident rate was 69.9 injuries per million man-hours

worked. This was down from the 1960 rate of 131.8, but still five times higher than the national average.

As the industrial nations of the world began to recover after World War II, they started to upgrade their shipping fleets to gain a competitive edge and take advantage of the mechanization in cargo handling and packaging. The demand for larger and faster ships increased building and operational costs and dictated reducing port time in order to lower transportation costs. Shipping owners found that the time spent in port was 10 percent higher than the time spent at sea. A common shippers' axiom is that time at sea is money earned, while time at port is money lost.

The first cargo handling equipment ever used was the longshoreman's hook, a tool still used today for moving loose bales, boxes, and sacks. The rope sling is the oldest piece of hoisting equipment, and also is still used today. Before World War II, the continuous escalator belt had been developed, greatly accelerating the loading and unloading of loose sacks, bales, and boxes. At the same time, the mechanized pouring of grain into the ships' holds took the place of sacking the grain and manually placing it on the ship.

During the war, the development of the forklift was another major breakthrough in terms of equipment. Other machinery developed later included the whirley cranes, which handle 35-ton loads; clam shells, which consume 2 to 13 tons per bite; Gantry cranes, which lift containers weighing 20 to 40 tons; and the automatic revolving cylinder, which clamps a railroad car that can dump its 90-ton load in 45 seconds.

Cargo packaging began to change radically about 1955 to keep pace with the mechanization of cargo handling equipment. Break bulk cargo or loose cargo in sacks, bags, and boxes that had to be handled item by item

began to give way to the packaged or unitized load and the container. The packaged or unitized load is made up by the manufacturer and is strapped or glued together on a pallet and handled as a unit at dockside. The container, also handled as a unit at dockside, is a box measuring either 8 x 8 x 20 feet and holding 20 tons, or 8 x 8 x 40 feet and holding 40 tons.

With the advent and rapid growth of the container and container leasing companies (see Figure 8, U.S. Container Inventory Comparison 1975-1972, and Figure 9, U.S. Container Ownership—Carrier vs. Leased 1975-1972), the mechanization of cargo handling exploded. Originally the container ship was hailed as the ship of the future, but it quickly became apparent that many countries of the world could not afford the sophisticated port facilities necessary to load and unload a containerized ship.

To serve underdeveloped ports, it is now predicted that the ships of the future will be the roll-on/roll-off vessels that drop huge ramps onto the docks so that the ships' own equipment moves the containers and pallets on and off the ships. The cargo will be loaded onto a truck, train, or barge at dockside by the lighter aboard ship (LASH), which has cranes to swing over the water. Thus an entire barge can be loaded with contents weighing 80 to 100 tons and floated like a massive container to any convenient point.

When all cargo is shipped by bulk or container, only 20 percent of the current longshore work force will be needed. The ratio of tonnage to man-hours in the loading and unloading of a fully containerized cargo compared to a break bulk cargo varies from 13 to 1 to 18 to 1. A single longshoreman can now handle 13 to 18 times more cargo an hour if it is in a container. For bulk cargo such as sugar, wheat, and iron ore, the ratio is 8 to 1.

Management associations representing the shipowners, stevedores, and terminal owners are principally the New York Shipping Association, Inc. for the east coast, the New Orleans Steamship Association for the gulf coast, and the Pacific Maritime Association for the west coast (see Figure 10, Major Maritime Management Associations).

Unions representing the longshoremen are principally the International Longshoremen's Association (ILA), with 49,000 longshoremen led by Thomas W. Gleason for the east coast, Great Lakes and gulf coast, and the International Longshoremen's and Warehousemen's Union (ILWU), with 12,000 longshoremen led by Harry Bridges for the west coast (see Figure 11, Longshore Unions).

Both unions and management organizations in the United States underwent dramatic changes in the mid-1950's because of technological changes in the industry and economic growth and competition from other countries for the U.S. export business. As bulk and unitized loading became more important in the 1950's, the many small, privately owned steamship and stevedoring companies could not afford the capital outlay for the new equipment needed. These small firms were sold to or merged with conglomerates and multinational companies. Large industrial firms also began operating their own shipping companies, and with the new, larger stevedoring companies they became a more dominant voice in the management organizations.

In 1954, the ILA was expelled from the American Federation of Labor (AFL) after ILA President Joseph Ryan and local leaders resigned because of criminal investigations or indictments. At the same time, the AFL chartered the International Brotherhood of Longshoremen (IBL-AFL) to organize the longshoremen. The resulting battle between the ILA and the IBL left deep

scars in the ILA when it was readmitted to the AFL-CIO in 1959. The turbulent strikes and negotiations of the 1960's reflected the tensions between the unions.

The need for longshoremen is declining, and the union is now involved in protecting the earnings of its members as the phaseout continues. The upcoming ILA contract negotiations in September 1977 will deal with such matters as requiring that all containers and unitized cargo be assembled and broken down by longshoremen within a 50-mile radius of the port and minibridge, and preventing the current trend toward moving goods by rail from the east coast to the Pacific coast for shipment across the Pacific Ocean.

APPENDIX B

XIV. INSURANCE

Program Description

Employers covered by the Longshoremen's and Harbor Workers' Compensation Act or one of its extensions are required to obtain insurance fron an insurance company authorized by the OWCP, or may become authorized as self-insurers to pay benefits directly to injured employees. Applications for authorization to insure or to self-insure benefits under the appropriate Act are submitted to the national office of the OWCP.

The DLHWC Branch of Insurance handles all requests for information regarding authorization of an insurance company or employer, and sends complete details and application forms to all employers requesting information. When a properly prepared application with all necessary information is received, the Branch of Insurance tries, within 30 days, to inform the applicant on the application's probability of approval. If additional information is required before the application can be considered, the company is generally advised accordingly within 5 working days.

A printed application form is not required for insurance companies to request authorization. A written request signed by an officer of the company is sufficient. The application also requires information regarding the company's experience in writing workers' compensation insurance, and evidence that it has authority in its charter or form of organization to write workers' compensation. If the application is approved by the DLHWC, authorization forms are submitted to the OWCP Director for final approval and signature. An uncomplicated application should be processed between 30 and 60 days.

Applications to self-insure also are the responsibility of the Branch of Insurance, DLHWC, and frequently must be processed quickly because an employer's insurance policy is about to expire. Processing applications to self-insure usually requires from 60 to 90 days, but occasionally may be completed within 30 days. Should the requesting company have difficulty in meeting OWCP's requirements, an application may take 6 months to process, and in unusual situations a year may be necessary. Delays are not necessarily the fault of the DLHWC. Usually, they are due to the company's inability to provide the required information or obtain the required financial backing required by DLHWC to insure against defaulted payments.

In considering employers' applications the Branch of Insurance must examine applicants' financial positions conservatively. A company may be liable for many years for benefits resulting from injuries or deaths. Self-insured employers are required to secure their liability under the Act in amounts determined by the OWCP in the form of an indemnity bond or deposit of approved negotiable securities. Indemnity bonds are held by the DLHWC and negotiable securities are held by Federal Reserve Banks and released only on the approval of the Department of Labor.

Annual reviews are made of authorized insurance companies for renewal of their authorizations. Renewal of an authorization must be requested. Self-insured companies' authorizations may be renewed each year by filing a renewal indemnity bond or by maintaining the security deposit with a Federal Reserve bank. Approximately every 18 months, or as soon as possible if more than 18 months elapses, the Branch of Insurance requests self-insured employers to report all active disability or death cases and their estimated value of each case. The Insurance Branch transmits these reports to district of-

fices for verification of the estimates by the deputy commissioner, whose review should be completed within 60 days of referral. The national office makes the final determination of the reserve requirement.

Coverage of individual employers coming under the Act is monitored by the OWCP district offices. A certificate of compliance is furnished each active employer on receipt of a notice of coverage from the insurance carrier. The notice of coverage, card Form LS-570, when received by the district office, is then filed within 48 hours of receipt and the expired card removed. The insurance cards are reviewed every 60 days to prevent lapses of coverage. The district office is responsible for notifying an employer of the expiration of coverage if a new card report is not received.

The OWCP does not have authority under the Longshore Act to set or regulate rates charged for coverage or to direct insurance carriers to write coverage for individual employers under the Act. The OWCP cannot require carriers to form an assigned-risk pool to provide coverage under present law.

Findings

Due to the high benefit levels currently provided under the LHWCA, and uncertainty regarding future liabilities under the Act, a large and growing number of insurance carriers have withdrawn from writing coverage under the Longshore Act. Those who continue to write such coverage quote premium rates which many employers feel are excessive. The result is an increase in the number of applications for self-insurance from marginally profitable companies. The industry asserts, with supporting evidence, that the costs of obtaining longshore coverage—which have increased so dramatically since the enactment of the 1972 amendments—are becoming prohibitive for small firms. They are substantially affecting the economic position of larger firms, and are creating the gaps in the availability of coverage.

Longshore coverage is difficult to obtain in some areas of the country, particularly on the west coast. The market for coverage for small employers in the State of Washington is now virtually nonexistent. However, the Washington Legislature is expected to remedy this in January 1977, by passing legislation which will permit the Washington State Fund to provide coverage under the Act. In June 1976 the State of California passed such legislation, which temporarily has resolved the coverage availability problem there. The California law provides the State fund with authority to write longshore coverage for only 2 years. The California Legislature indicated that the problem of providing coverage under the Longshore Act is a Federal problem and therefore should be resolved at the Federal level on a permanent basis.

A possible solution to the present problem of high rates may be to permit small employers to self-insure as a group.

Undoubtedly, there are a large number of small employers who are uninsured under the Act. It may be necessary to establish some form of enforcement program. High rates and lack of coverage availability are contributing reasons for noncompliance with insurance requirements.

Proper maintenance of coverage cards at the district office level is a problem because of insufficient staff. Automation of this function may be desirable, and should be considered in developing an automatic data processing (ADP) system.

Recommendations

The Task Force recommends that:

1. OWCP undertake a comprehensive fact-finding study of the insurance problems obstructing the effective administration and implementation of the LHWC. The study should include an alaylsis of the mechanics of rate-setting, availability of coverage for employers, possible action which DOL can take within present legal limits, and possible alternatives to insure that the required insurance is available at a reasonable cost. The study should also assess the feasibility of group self-insurance to reduce present gaps in coverage.
2. OWCP study the feasibility of computerizing the insurance coverage system (now performed in the district offices) to make available a central index of all coverage, current and past. This study should be included as part of the ADP system for developing a management information system and automating special fund operations in the national office of the DLHWC.
3. OWCP monitor developments in proposed legislation in the State of Washington aimed at providing coverage for employers through the Washington State Fund. (The Fund is presently prohibited by law from providing Federal coverage.)